24TH FEDERAL LITIGATION COURSE

FEDERAL JURISDICTION

I. FEDERAL JUDICIAL POWER.

A. General.

"The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority; -- to all Cases affecting Ambassadors, other Public Ministers and Consuls; -- to all Cases of admiralty and Maritime Jurisdiction; -- to Controversies to which the United States shall be a party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

-- U.S. Const. art. III, § 2.

B. Limited jurisdiction. See generally Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 11 (1799).

1. Subjects and Parties. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821).

2. Cases and Controversies -- Justiciability. Flast v. Cohen, 392 U.S. 83, 94-95 (1968).

II. CONGRESSIONAL GRANTS OF JURISDICTION

A. General.

1. Except for Supreme Court's original jurisdiction derived directly from the Constitution, federal judicial power is dependent upon a statutory grant of jurisdiction. Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Stevenson v. Fain, 195 U.S. 165, 167 (1904); Mayor of Nashville v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867).

a. Jurisdictional statute may be more restrictive than the Constitution. Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

b. Jurisdictional statute may not exceed constitutional limits of jurisdiction. Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809).

2. The burden of pleading and proving the subject-matter jurisdiction of the court is on the plaintiff. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182, 189 (1936).

3. The United States cannot be sued without its consent. United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586 (1941).

4. See Selected Federal Statutes, D-III-1 to D-III-4.

B. Federal Question Jurisdiction 28 U.S.C. § 1331.

1. The statute: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

2. Historical origins.

3. The meaning of "arising under federal law."

a. "[A]n action arises under federal law . . . if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law -- whether that proposition is independently applicable or becomes so only by reference from state law." P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System, page 889 (3d ed. 1988).

(1) Federal causes of action. American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) (Holmes, J.) ("A suit arises under the law that creates the cause of action").

(2) Vindication of right under state law necessarily turns on some construction of federal law. Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). Cf. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) (federal preemption).

(a) The mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 813 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205 (1934).

(b) The federal question must be substantial and form an essential part of the cause of action. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Gully v. First Nat'l Bank, 299 U.S. 109 (1936); Smith v. Grimm, 534 F.2d 1346 (9th Cir.), cert. denied, 429 U.S. 980 (1976).

b. "Well-pleaded complaint" rule: In determining whether a case arises under federal law, a court generally is confined to the well-pleaded allegations of the plaintiff's complaint. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808 (1987); see also, International Primate Protection League v. Administrators of Tulane Education Fund, 500 U.S. 72 (1991); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

-- Federal question cannot simply be the basis of an anticipated defense. Oklahoma Tax Commission v. Graham, 489 U.S. 838 (1989); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

-- In declaratory judgment action, federal question jurisdiction is lacking if the federal claim would arise only as a defense to a state created action. Amsouth Bank v. Dale, 386 F.3d 763, 775 (6th Cir. 2004).

-- However, complete preemption provides a limited exception to the well pleaded complaint rule. That is "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). *See also* Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, __ U.S. __, 125 S.Ct. 2363 (2005)(the meaning of a federal tax provision is an important federal law issue that supports federal question jurisdiction in this state quiet title action).

4. What constitutes federal law

   a. Constitution.

   b. Statute.

   c. Federal common law. Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

d. Executive regulations. *Compare* Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 7-8 (3d Cir. 1964)(validly issued administrative regulations or orders may be treated as "laws of the United States") *with* Chaase v. Chasen, 595 F.2d 59 (1st Cir. 1979)(customs circular concerning employee overtime does not constitute one of the "laws of the United States") *and* Federal Land Bank v. Federal Intermediate Credit Bank, 727 F. Supp. 1055 (S.D. Miss. 1989)(financial directive by Farm Credit Administration not a "law of the United States").

e. Treaties. *Compare* Int'l Ins. Co. v. Caja Nacional De Ahorro Y Seguro, 293 F.3d 392 (7th Cir. 2002)(holding that Panama Convention provided independent federal question jurisdiction) *with* Chubb & Son, Inc. v. Asiana Airlines, 214 F. 3d 301 (2d Cir. 2000)(holding that court lacks subject matter jurisdiction in absence of treaty relationship between U.S. and South Korea).

5. Elimination of the amount in controversy requirement.

a. Pub. L. No. 94-574, 90 Stat. 2721 (1976) -- Lawsuits against the United States, any agency thereof, or any officer or employee in his or her official capacity.

b. Pub. L. No. 96-486, 94 Stat. 2369 (1980) -- All lawsuits.

6. Federal question jurisdiction statute does not waive the Government's sovereign immunity. See, e.g., Clinton County Com'rs v. U.S. Envtl. Protection Agency, 116 F.3d 1018, 1022 (3rd Cir. 1997); Gochnour v. Marsh, 754 F.2d 1137, 1138 (5th Cir.), cert. denied, 471 U.S. 1057 (1985); State of New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985).

C. The Tucker Act. 28 U.S.C. §§ 1346(a)(2), 1491.

1. The statutes:

a. "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

-- 28 U.S.C. § 1346(a)(2) ("Little Tucker Act").

b. "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages not sounding in tort. . . ."

-- 28 U.S.C. § 1491(a)(1) ("Tucker Act").

c. Amendments conferring bid protest jurisdiction.

-- 28 U.S.C. § 1491(b)(1) – (4), as modified by "sunset provision" for district court jurisdiction.

2. General.

a. Must be brought within 6 years of accrual of claim. 28 U.S.C. § 2501.

b. Monetary damages only in Court of Federal Claims (with exception of bid protests.)

c. Jurisdictional statute only; confers no substantive rights for plaintiff. In order to state a claim upon which relief may be granted, must demonstrate independent "money-mandating" basis for relief sought:

(1) Contract (must demonstrate all elements of enforceable contract.)

(2) Statute or regulation with mandatory provisions establishing entitlement to money (military/ civilian personnel claims).

(3) Constitution (Fifth Amendment takings claims heard by COFC).

(4) Not sounding in tort.

3. Concurrent jurisdiction of the district courts and the Court of Federal Claims.

a. Claims not exceeding $10,000: district courts and Court of Federal Claims have concurrent jurisdiction.

b. Claims exceeding $10,000: Court of Federal Claims has exclusive jurisdiction.

(1) The amount of a claim is the total amount of money the plaintiff ultimately stands to recover in the case. Smith v. Orr, 855 F.2d 1544 (Fed. Cir. 1988); Chabal v. Reagen, 822 F.2d 349 (3d Cir. 1987); Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Goble v. Marsh, 684 F.2d 12 (D.C. Cir. 1982).

-- Determined by the good-faith allegations of the plaintiff's complaint. Id. See also Zumerling v. Devine, 769 F.2d 745 (Fed. Cir. 1985).

(2) Transfer to Court of Federal Claims under 28 U.S.C. § 1631. State of New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); Keller v. MSPB, 679 F.2d 220 (11th Cir. 1982).

(3) Waiver of claims in excess of $10,000. Zumerling v. Devine, 769 F.2d 745 (Fed. Cir. 1985); Goble v. Marsh, 684 F.2d 12 (D.C. Cir. 1982); Lichtenfels v. Orr, 604 F. Supp. 271 (S.D. Ohio 1984).

c. Demands for monetary and nonmonetary relief: finding a Tucker Act Claim.

(1) General rules:

(a) The federal courts will look beyond the facial allegations of the complaint to determine what the plaintiff hopes to acquire from the lawsuit. E.g., Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991); Amoco Prod. Co. v. Hodel, 815 F.2d 352 (5th Cir. 1987); Weeks Constr., Inc. v. Oglala Sioux Hsg. Auth., 797 F.2d 668 (8th Cir. 1986). But see Gower v. Lehman, 799 F.2d 925 (4th Cir. 1986) (court looked to nature of plaintiff's cause of action rather than relief requested).

(b) The plaintiff cannot hide a claim for money damages by couching the claim in equitable terms. E.g., Denton v. Schlesinger, 605 F.2d 484 (9th Cir. 1979); Polos v. United States, 556 F.2d 903 (8th Cir. 1977).

(c) Where equitable or declaratory claim serves a significant purpose independent of recovering money damages, it does not necessarily fall under the Tucker Act because it may later become the basis for a money judgment. Duke Power Co. v. Carolina Envt'l Study Group, 438 U.S. 59, 71 n.15 (1978); Hahn v. United States, 757 F.2d 581 (3d Cir. 1985); Giordano v. Roudebush, 617 F.2d 511 (8th Cir. 1980).

(d) A claim falls under the Tucker Act when the "prime objective" of the plaintiff's suit is nontort money damages from the United States. E.g., Fairview Township v. United States EPA, 773 F.2d 517 (3d Cir. 1985); United States v. City of Kansas City, 761 F.2d 605 (8th Cir. 1985); Powell v. Marsh, 560 F. Supp. 636 (D.D.C. 1983).

(2) Distinguishing damages from specific relief or equitable relief. See, Bowen v. Massachusetts, 487 U.S. 905 (1988) (monetary relief, other than damages, may be an incident to specific relief granted).

(3) Bifurcating the Tucker Act and nonmoney claims. Compare Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Hahn v. United States, 757 F.2d 581 (3d Cir. 1985), with Matthews v. United States, 810 F.2d 109 (6th Cir. 1987); Keller v. MSPB, 679 F.2d 220 (11th Cir. 1982).

4. The Tucker Act and substantive rights to relief. United States v. Testan, 424 U.S. 392 (1976). See also Murphy v. United States, 993 F.2d 871 (Fed. Cir. 1993); Commonwealth of Mass. v. Departmental Grant Appeals Bd., 815 F.2d 778 (1st Cir. 1987); Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441 (D.C. Cir. 1985).

5. Appeal of Tucker Act cases.

a. General rule: Court of Appeals for the Federal Circuit has exclusive jurisdiction over all appeals where the district court's jurisdiction is based, in whole or in part, on the Tucker Act. 28 U.S.C. § 1295; United States v. Hohri, 482 U.S. 64 (1987); Professional Managers' Ass'n v. United States, 761 F.2d 740 (D.C. Cir. 1985); Parker v. King, 935 F.2d 1174 (11th Cir. 1991), cert. denied 112 S. Ct. 3055 (1992); Trayco Inc. v. United States, 967 F.2d 97 (4th Cir. 1992); Banks v. Garrett, 901 F.2d 1084 (Fed. Cir. 1990), cert. denied 498 U.S. 821 (1990); Sibley v. Ball, 924 F.2d 25 (1st Cir. 1991); Wronke v. Marsh, 767 F.2d 354 (7th Cir. 1985).

b. Exceptions:

(1) Tucker Act claim frivolous or exceeds the jurisdiction of the district court. Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907 (3d Cir. 1987); Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Van Drasek v. Lehman, 762 F.2d 1065 (D.C. Cir. 1985).

(2) Another statute independently confers jurisdiction. Van Drasek v. Lehman, 762 F.2d 1065 (D.C. Cir. 1985). But cf. Wronke v. Marsh, 767 F.2d 354 (7th Cir. 1985); Maier v. Orr, 754 F.2d 973 (Fed. Cir. 1985).

(3) Regional court of appeals has already decided the case. Squillacote v. United States, 747 F.2d 432 (7th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). But see Professional Managers Ass'n v. United States, 761 F.2d 740 (D.C. Cir. 1985).

D. The Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2671-2680.

1. The statute:

"[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injuries or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

-- 28 U.S.C. § 1346(b).

2. Historical origins.

3. Jurisdictional prerequisites:

a. Administrative claim requirement. 28 U.S.C. § 2675; Lee v. United States, 980 F.2d 1337 (10th Cir. 1992); Avila v. INS, 731 F.2d 616 (9th Cir. 1984).

b. Statute of limitations. 28 U.S.C. § 2401; McNeil v. United States, 964 F.2d 647 (7th Cir. 1992), aff'd 113 S.Ct. 1980 (1993); Conn v. United States, 867 F.2d 916 (6th Cir. 1989); GAF Corp. v. United States, 818 F.2d 901 (D.C. Cir. 1987).

c. Strictly construed. Lee v. United States, 980 F.2d 1337 (10th Cir. 1992) (administrative claim requirement); Gould v. Dep't of Health and Human Services, 905 F.2d 738 (4th Cir 1990); NcNeil v. United States, 964 F.2d 647 (7th Cir 1992), aff'd, 113 S. Ct. 1980 (1993).

4. Limitations.

a. Limited to the amount of the administrative claim. 28 U.S.C. § 2675(b). See Jackson v. United states, 730 F.2d 808, 810 (D.C. Cir. 1984).

b. Types of torts specifically excepted. 28 U.S.C. § 2680.

(1) Discretionary function.

(2) Intentional torts.

(3) Arising out of combatant activities.

(4) Arising in a foreign country.

c. State statutory limitations.

E. Mandamus. 28 U.S.C. § 1361.

1. The statute: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

2. Historical origins.

F. Habeas Corpus. 28 U.S.C. §§ 2241-2255.

1. The statute:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .
. . .

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or any order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States."

-- 28 U.S.C. § 2241.

2. Historical origins.

3. Jurisdictional prerequisites:

a. Custody: The petitioner must be in custody. 28 U.S.C. § 2241; Maleng v. Cook, 490 U.S. 488 (1989); Wales v. Whitney, 114 U.S. 564 (1885).

(1) Types of custody.

(a) Confinement. E.g., Ex Parte Reed, 100 U.S. 13 (1879).

(b) Involuntary military service. E.g., Parisi v. Davidson, 405 U.S. 34 (1972); Wiggins v. Secretary of the Army, 946 F.2d 892 (5th Cir. 1991).

(2) Jurisdiction is not lost if the petitioner is subsequently released. Carafas v. La Vallee, 391 U.S. 234 (1968); cf. Hensley v. Municipal Court, 411 U.S. 345 (1973) (bail); Jones v. Cunningham, 371 U.S. 236 (1963) (parole).

b. Venue: Petitioner's presence within the territorial jurisdiction of the district court jurisdiction is not an invariable prerequisite. Rather, because the writ of habeas corpus does not act upon the person who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody, a district court acts within its respective jurisdiction as long as the custodian can be reached by service of process. Rasul v. Bush, 542 U.S. 466 (2004). *See also* Rumsfeld v. Padilla, 542 U.S. 426 (2004); Rooney v. Secretary of the Army, 405 F.3d 1029 (D.C. Cir. 2005).

G. Civil Rights Statutes. 28 U.S.C. § 1343.

"(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of a conspiracy mentioned in section 1985 of Title 42;

(2) To redress the deprivation, under color of State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

-- 28 U.S.C. § 1343.

H. Other statutes granting jurisdiction.

I. Provisions often <u>erroneously</u> cited as jurisdictional grounds for federal lawsuits.

1. Administrative Procedure Act, 5 U.S.C. §§ 701-06. Califano v. Sanders, 430 U.S. 99 (1977).

2. Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1952).

3. Others.

III. JUSTICIABILITY.

A. Introduction.

1. Constitutional limits on federal jurisdiction.

a. Cases that raise certain subjects or involve certain parties. U.S. Const. art. III, § 2.

b. "Cases" and "Controversies." Id.

2. Justiciability is the term of art employed to give expression to the dual limitation imposed upon the federal courts by the "case and controversy" doctrine. Flast v. Cohen, 392 U.S. 83 (1968).

a. Involves application of both constitutional limitations and prudential concerns.

b. Two-pronged doctrine:

(1) Adversarial prong.

(2) Political question prong.

3. Justiciability and the role of the federal courts. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363 (1973).

B. The Adversarial Prong

1. General.

2. Advisory opinions.

a. Definition. An advisory opinion is an answer to a hypothetical question of law unconnected to any particular case.

b. Examples: Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); Correspondence of the Justices and Secretary of State Thomas Jefferson (1793).

3. Ripeness.

a. Definition: "[T]he conclusion that an issue is not ripe for adjudication ordinarily emphasizes a prospective examination of the controversy which indicates that future events may affect its structure in ways that determine its present justiciability, either by making a later decision more apt or by demonstrating directly that the matter is not yet appropriate for adjudication by an article III court." L. Tribe, American Constitutional Law 61 (2d Ed. 1988) (emphasis in the original).

b. Rationale: Avoid premature adjudication of suits and protect agencies from unnecessary judicial interference. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99 (1977). And avoid "abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. Id., at 148-49. See also Nat'l Park Hospitality Ass'n. v. Dept. of Interior, 538 U.S. 803 (2003).

c. Rule: In determining whether a case is ripe for adjudication, a court must--

(1) Evaluate the fitness of the issues for judicial decision; and

(a) Is the agency action final?

(b) Are the issues legal or factual?

(c) Have administrative remedies been exhausted?

(d) What is the nature of the record created?

(2) Determine the hardship to the parties of withholding court decision.

(a) What is the likelihood the challenged action will affect the plaintiff?

(b) What is the nature of the consequences risked by the plaintiff if affected by the action?

(c) Will the plaintiff be forced to alter conduct as a result of the action?

d. Examples:

(1) Pre-enforcement attacks on statutes or regulations. Compare Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967), with Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) overruled other grounds Califano v. Sanders, 430 U.S. 99 (1977). See also Nat'l Park Hospitality Ass'n. v. Dept. of Interior, 538 U.S. 803 (2003).

(2) Challenges to pending administrative or judicial proceedings. Hastings v. Judicial Conference, 770 F.2d 1093 (D.C. Cir. 1985); Watkins v. United States Army, No. C-81-1065R (W.D. Wash. Oct. 23, 1981).

(3) Threat to commit military forces without congressional authorization. Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

4. Mootness.

a. Definition: "[M]ootness looks primarily to the relationship between past events and the present challenge in order to determine whether there remains a 'case or controversy' that meets the article III test of justiciability." L. Tribe, American Constitutional Law 62 (1988).

b. General rule: There is no case or controversy once the issues in a lawsuit have been resolved.

c. Test: A case becomes moot when--

(1) "[I]t can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur," and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."

-- County of Los Angeles v. Davis, 440 U.S. 625, 635 (1979); See also McFarlin v. Newport Special School District, 980 F.2d 1208 (8th Cir. 1992).

d. Examples:

(1) Save the Bay, Inc. v. United States Army, 639 F.2d 1100 (5th Cir. 1981).

(2) Quinn v. Brown, 561 F.2d 795 (9th Cir. 1977).

(3) Ringgold v. United States, 553 F.2d 309 (2d Cir. 1977).

(4) Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985).

(5) Oakville Development Corp. v. FDIC, 986 F.2d 611 (1st Cir. 1993).

(6) Ethredge v. Hail, 996 F.2d 1173 (11th Cir. 1993).

e. Exceptions:

(1) Capable of repetition, yet evading review. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

(a) Test:

i) The challenged action is too short in its duration to be fully litigated prior to its cessation or expiration; and

ii) There is a reasonable expectation the same complaining party will be subject to the same action again.

-- Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

(b) Examples: Compare Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991) (No. 91-5019), with Flynt v. Weinberger, 588 F. Supp. 57 (D.D.C. 1984), aff'd, 762 F.2d 134 (D.C. Cir. 1985) and Nation Magazine v. Department of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991).

(2) Voluntary cessation.

(a) Rule: A case is not made moot merely because a defendant voluntarily ceases his allegedly unlawful conduct. United States v. W.T. Grant Co., 345 U.S. 629 (1953).

(b) Example: Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).

(3) Collateral consequences.

(a) Rule: A case is not moot where, even though stopped, the government's allegedly unlawful conduct leaves lasting adverse consequences. Sibron v. New York, 392 U.S. 40 (1968).

(b) Example: Connell v. Shoemaker, 555 F.2d 483 (5th Cir. 1977).

(4) Class actions.

(a) Mootness of the class representative's claim after the class has been certified: the case is not moot. Sosna v. Iowa, 419 U.S. 393 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

(b) Mootness of the class representative's claim after motion for class certification has been made and denied, but before appeal from the denial: the case is not moot. United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

i) The Supreme Court has proscribed the interlocutory appeal of denials of class certification. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978); Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

ii) The Supreme Court has allowed class members to intervene to appeal the denial of class certification after the named plaintiff's claim has been fully satisfied. United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977).

(c) Mootness of the class representative's claim before class certification: the case may be moot. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975).

(d) Mootness of the claims of the members of the class: the case may be moot or the class may be realigned. Kremens v. Bartley, 431 U.S. 119 (1977).

5. Standing.

a. General.

(1) Focuses primarily on the party seeking to get his complaint before the federal court, and only secondarily on the issues raised.

(2) Subsumes both constitutional and prudential considerations.

b. Constitutional Requirements.

(1) General rule: To establish standing, a plaintiff must demonstrate--

(a) That he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. [Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable?] Meese v. Keene, 481 U.S. 465 (1987); George v. State of Texas, 788 F.2d 1099 (5th Cir.), cert. denied, 479 U.S. 866 (1986).

i) An asserted right to have the government act in accordance with law does not confer standing. Allen v. Wright, 468 U.S. 737 (1984); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1978).

ii) Mere interest of plaintiff in an issue does not confer standing. Diamond v. Charles, 476 U.S. 54 (1986); Sierra Club v. Morton, 405 U.S. 727 (1972); International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934 (4th Cir. 1986).

(b) That the injury is traceable to the acts or omissions of the defendant (causation requirement). [Is the line of causation between the illegal conduct and injury too attenuated?] Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).

(c) That the plaintiff's stake in the controversy is sufficient to ensure that the injuries claimed will be effectively redressed by a favorable court decision. [Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?] Linda R.S. v. Richard D., 410 U.S. 614 (1973).

(2) Illustrative cases: Compare Laird v. Tatum, 408 U.S. 1 (1972), with Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).

c. Taxpayer Standing.

(1) Test: To establish standing as a taxpayer, a plaintiff must demonstrate--

(a) A nexus between his taxpayer status and the type of legislation being challenged. Taxpayer standing is only proper where the plaintiff challenges exercises of congressional power under the taxing and spending clause of the Constitution. U.S. Const. art. I, § 8.

(b) A nexus between the taxpayer status and the precise nature of the constitutional infringement alleged. The plaintiff must show a specific constitutional limitation on the taxing and spending power of Congress.

-- Flast v. Cohen, 392 U.S. 83, 102-103 (1968); Frothingham v. Mellon, 262 U.S. 447 (1923).

(2) Illustrative case: Katcoff v. Marsh, 582 F. Supp. 468 (E.D.N.Y. 1984), aff'd, in part 755 F.2d 223 (2d Cir. 1985).

(3) Variations in approach:

(a) Challenge to congressional exercise under the property clause, U.S. Const. art. I, § 3, cl. 2. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

(b) Challenge under the incompatibility clause, U.S. Const. art. I, § 9, cl. 7. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

(c) Challenge under the accounting clause, U.S. Const. art. I, § 9, cl. 7. United States v. Richardson, 418 U.S. 166 (1974)

(d) Challenge under foreign affairs powers, U.S. Const. art. I, § 10, cl. 1. Americans United for Separation of Church & State v. Reagan, 786 F.2d 194 (3d Cir. 1986).

(e) Challenge under war powers and Commander-in-Chief clauses, U.S. Const. art. I, § 8, cl. 11 and art. II, § 2. Pietsch v. Bush, 755 F.Supp. 62 (E.D.N.Y.), aff'd, 935 F.2d 1278 (2d Cir. 1991).

d. Citizen Standing. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Pietsch v. Bush, 755 F. Supp. 62 (E.D.N.Y.), aff'd, 935 F.2d 1278 (2d Cir. 1991).

e. Prudential Standing Considerations.

(1) Jus tertii.

(a) General rule: A plaintiff may not claim standing to vindicate the constitutional rights of third parties. Tileston v. Ullman, 318 U.S. 44 (1943); Tyler v. Judges of Ct. of Registration, 179 U.S. 405 (1900); Monaghan, Third Party Standing, 84 Colum. L. Rev. 277 (1984).

i) Corollary: A plaintiff may only challenge a statute or regulation in the terms in which it is applied to him. Parker v. Levy, 417 U.S. 733 (1974).

ii) Rationale: (A) courts should not make unnecessary constitutional adjudications, and (B) the holders of constitutional rights are the best parties to assert the rights. Singleton v. Wulff, 428 U.S. 106 (1976).

(b) Exceptions:

i) Countervailing policies. See, e.g., Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); Singleton v. Wulff, 428 U.S. 106 (1976).

ii) Statute confers third-party standing. See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

(2) "Generalized grievances" shared in substantially equal measure by all or a large class of citizens. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Pietsch v. Bush, 755 F. Supp. 62 (E.D.N.Y.), aff'd, 935 F.2d 1278 (2d Cir. 1991).

(3) Interest within the "zone of interests" arguably protected or regulated by the law in question. Lujan v. National Wildlife Foundation, 504 U.S. 555 (1992); Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); National Federation of Fed. Employees v. Cheney, 883 F.2d 1038 (D.C. Cir.), reh'g denied, 892 F.2d 98 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3214 (1990); Hadley v. Secretary of the Army, 479 F. Supp. 189 (D.D.C. 1979).

f. Associational Standing.

(1) Suits for injuries suffered by the association. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); NAACP v. Alabama, 357 U.S. 449 (1958).

(2) Suits for injuries suffered by members. International Union, UAW v. Brock, 477 U.S. 274 (1986); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 342-43 (1976). See also Randolph-Sheppard Vendors v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986). For an association to have standing to sue on behalf of its members, it must show:

(a) The conduct challenged is injurious to its members;

(b) The claim asserted is germane to the association's purposes; and

(c) The cause can proceed without the participation of the individual members affected by the challenged conduct.

C. The Political Question Prong.

1. Description of the Doctrine.

a. "Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable or manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of

embarrassment from multifarious pronouncements by various departments on one question."

-- Baker v. Carr, 369 U.S. 186, 217 (1962).

b. "[T]he doctrine incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate political branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?"

-- Goldwater v. Carter, 444 U.S. 996, 998 (1980) (Powell, J., concurring).

2. Illustrative cases:

a. Organization, training, and weaponry of the armed forces. Gilligan v. Morgan, 413 U.S. 1 (1973).

b. Commitment and use of military forces. Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990); Nejad v. United States, 724 F. Supp. 753 (C.D. Cal. 1989); In re Korean Air Lines Disaster of Sept. 1, 1983, 597 F. Supp. 613 (D.D.C. 1984); Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984), aff'd, 755 F.2d 34 (2d Cir. 1985); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), appeal dismissed, 765 F.2d 1124 (D.C. Cir. 1985); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), aff'd, 770 F.2d 202 (D.C. Cir. 1985); Rappenecker v. United States, 509 F. Supp. 1024 (N.D. Cal. 1980); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), cert. denied, 389 U.S. 1022 (1967). But see Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

c. Establishment of diplomatic relations. Phelps v. Reagan, 812 F.2d 1293 (10th Cir. 1987); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194 (3d Cir.), cert. denied, 479 U.S. 1012 (1986).

d. Repatriation of POW's. Smith v. Reagan, 637 F. Supp. 964 (E.D.N.C. 1986); Dumas v. President of the United States, 554 F. Supp. 10 (D. Conn. 1982).

e. Relief from or placement in command. Wood v. United States, 968 F.2d 738 (8th Cir. 1992).

f. Setting standards at service academies. Green v. Lehman, 544 F. Supp. 260 (D. Md. 1982), aff'd, 744 F.2d 1049 (4th Cir. 1984).

g. Establishing promotion quotas. Blevins v. Orr, 553 F. Supp. 750 (D.D.C. 1982), aff'd, 721 F.2d 1419 (D.C. Cir. 1983).

h. Conduct of military intelligence activities. Laird v. Tatum, 408 U.S. 1 (1972); United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984).

i. Making political appointments. National Treasury Employees Union v. Bush, 715 F. Supp. 405 (D.D.C. 1989).

j. Enforcement of accession standards. Whittle v. United States, 7 F.3d 1259 (6th Cir. 1993).

k. President’s designation of pharmaceutical plant in Sudan as enemy property. El-Shifa Pharmaceutical Industries Co. v. United States, 378 F.3d 1346 (Fed. Cir. 2004).

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